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SOUND ADVICE  
FOR EMPLOYERS

# 2023 EMPLOYMENT LAW UPDATE

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# INTRODUCTION



# WHAT WILL WE COVER?

- New Laws
- New Regulatory Agency Policy (and Interpretations)
- Recent Court Cases
- What does the future hold?

# NEW LAWS

Laws adopted by federal, state & local governments



# Minimum Wage



# *Minimum Wage*

- Minimum wage to \$15.50 for all employers
- No distinction between sizes of employers
- Annual raises will follow CPI increases



# *Minimum Wage*

- Other effects:
  - Salary must be at least twice the amount (\$64,480) for white collar exemptions
  - Meal and rest period minimum penalties
  - “Unproductive time” and rest periods for piece-rate employees
  - Reporting-time pay, split-shift pay



# *Minimum Wage*

- Computer Software Professionals = *exempt if paid:*
  - \$53.80 per hour, or
  - annual salary of not less than \$112,065.20
  - No part-time “salary” employees



# *Minimum Wage*

- Physicians = *exempt if paid*:
  - \$97.99 per hour
- But could also be paid \$64,480 salary on a 'salary basis'!
- No similar hourly exemption for attorneys (unlike federal law) or *any other* professions (except software professionals, above)

# Local Minimum Wages



# *Minimum Wage*

- Local ordinances – throughout the Bay Area
  - Consider workers who spend some time in different jurisdictions (delivery, telecommute, etc.)
- Remember: Labor Commissioner can now recover amounts owed under *local* wage statutes!



# *Minimum Wage (No. Cal)*

- Alameda
- Belmont
- Burlingame
- Berkeley
- Cupertino
- Daly City
- East Palo Alto
- El Cerrito
- Emeryville
- Fremont
- Foster City
- Half Moon Bay
- Hayward
- Los Altos
- Menlo Park
- Milpitas
- Mountain View
- Novato
- Oakland
- Palo Alto
- Petaluma
- Redwood City
- Richmond
- San Carlos
- San Francisco
- South San Francisco
- San Jose
- San Leandro
- San Mateo
- Santa Clara
- Santa Rosa
- Sonoma
- South San Francisco
- Sunnyvale



# Local Ordinances

- Review *all* jurisdictions employees visit or work in
- Local ordinances proliferate:
  - Sick and family leave
  - Benefit contributions
  - Scheduling requirements
  - Many other varied local ordinances



# Meal & Lodging Credit

- Credits are now the same for employers of all sizes
- Small increase to the 2022 credits for 26+ employers
- Guidance at:
  - <https://www.dir.ca.gov/IWC/MW-2023.pdf>



# Minimum Wage Resources

- DIR: Minimum Wage and Exemption, Local Minimums
  - [https://www.dir.ca.gov/dlse/minimum\\_wage.htm](https://www.dir.ca.gov/dlse/minimum_wage.htm)
- Minimum Wage Frequently Asked Questions:
  - [https://www.dir.ca.gov/dlse/FAQ\\_MinimumWage.htm](https://www.dir.ca.gov/dlse/FAQ_MinimumWage.htm)

# Garnishment



# Garnishment

- SB 1477 – Effective September 1, 2023, C.C.P. § 706.050 reduces maximum garnishment amounts:
- disposable earnings subject to garnishment **must not exceed the lesser of:**
  - 20% of the individual's **disposable earnings** (total less FICA/Tax/SDI) for that week, or
  - 40% of the amount by which the individual's disposable earnings for that week exceed 48 times the state minimum hourly wage (\$744.00 or higher where local minimum applies)



# Garnishment

- The amounts are **adjusted *pro rata*** for pay made at different intervals (e.g., daily rates)
- The “minimum wage” increases **if a local minimum wage applies**
- Guidance (with a “**withholding calculator**”) at:  
<https://www.ftb.ca.gov/pay/collections/withholding-orders/wage-garnishments.html>

# Retirement Benefits



# CalSavers

- Expands CalSavers requirements to *all* employers with one or more employees (who do not offer a qualified retirement plan) by the end of 2025
- Law **already applies** to employers with five or more employees
- Important: employers who already offer a qualified retirement savings program are exempt but **requested to register** with CalSavers!



# CalSavers

- Covered employers :
  - Register for the program;
  - Provide personal information for each employee (name, SSN, DOB, contact information);
  - Deduct contributions (for employees who do not opt-out within 30 days of notice) each payroll period;
  - Forward the deductions to CalSavers within seven days of deduction via bank transfer



# CalSavers

- Issues:
  - Penalties up to \$750 total per employee
  - Mismatched or potentially invalid SSN?
  - Potential federal ERISA preemption
- Information: <https://www.calsavers.com/>

# Pay Data



# Pay Data Reporting

- (SB 1162) (Gov't Code § 12999): Expands pay data reporting for employers with 100+ employees
- Report mean and median pay rates for employees by:
  - Race
  - Ethnicity
  - Sex



# Pay Data Reporting

- Additional report required for employers with 100+ contingent employees (leased, labor contractors, etc.)
- Separate pay data report required for each location
- No consolidated report required, but the single or separate location reports must be in a format that may be manipulated via readily available software
- Guidance: <https://calcivilrights.ca.gov/paydatareporting/>



# Pay Scale Disclosure

# Pay Scale Disclosure

- (SB 1162) (Labor Code § 432.3): Employers must provide a position's pay scale to **applicants** and **employees** upon reasonable request
- “**Pay scale**” means the salary or hourly wage range that the employer **reasonably expects to pay** for the position.
- Must maintain **records of a job title and wage rate history** for each employee for three years after employment; records must be “**open to inspection by the Labor Commissioner**”
- Failure to maintain records raises a **rebuttable presumption** in favor of an employee's claim



# Pay Scale Disclosure

- **15 or more employees:** include the pay scale for a position in any **job posting**
- Enforced by Labor Commissioner:
  - **\$100 to \$10,000 fine** depending on “the totality of the circumstances”
  - No penalty for first **job posting** violation if all job postings for open positions are updated to include the pay scale
- May also be enforced by private lawsuit



# Pay Scale Disclosure

- Labor Commissioner guidance at:  
[https://www.dir.ca.gov/dlse/California\\_Equal\\_Pay\\_Act.htm](https://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm)
- Interpretations:
  - “Pay scale” does not include **bonuses, tips or other benefits**
  - “Pay scale” includes **piece rate and commissions**
  - Pay scale must be shown in job postings; **may not link** to another site or description



# Leaves for a “Designated Person”

# Designated Person

- (AB 1041) (Gov't Code § 12945.2): **Amends California Family Rights Act** (“CFRA”) to allow employees to take leave to care for any “**designated person**”
  - **related by blood**, or
  - whose association is the “**equivalent of a family relationship**”
- May be designated “**at the time the employee requests** the leave”
- **Employer may limit** election to one designated person per 12-month period



# Designated Person

- (AB 1041) (Labor Code § 245.5 ):
  - Amends Paid Sick Leave requirement to **include “designated person” as a family member**
  - “Designated person” includes *any* person “**identified by the employee** at the time the employee requests paid sick days” (no “blood” or “relationship” requirement)
  - May be designated “**at the time the employee requests paid sick days**”
  - **Employer may limit** election to one designated person per 12-month period



# Designated Person

- Issues:
  - **Use of vacation** as sick leave – will expand ability to use for *any* designated person
  - Be careful to distinguish between the **different definitions of “designated person”** (even though they come from the *same* bill!)



# Bereavement Leave

# Bereavement Leave

- (AB 1949) Gov't Code § 12945.7: Bereavement Leave
  - **Amends California Family Rights Act** (“CFRA”) (employers with five or more employees)
  - **Requires up to five days of bereavement leave** for death of a family member:
    - child, parent, sibling, grandparent, domestic partner, parent-in-law (but **not a designated person!**)



# Bereavement Leave

- Requirements:
  - Employee must have been **employed for 30 days**
  - Employee may take **up to five days** – need not be consecutive – within three months
  - **May be unpaid**, but employee may use vacation, personal leave, sick leave or compensatory time off
  - Documentation: Employer may request ***within 30 days*** documentation such as a death certificate, published obituary, or written verification

# Reproductive Health Decisionmaking



# Reproductive Health

- (SB 523) (Gov't Code § 12920 *et al.*): Amends the Fair Employment and Housing Act (“FEHA”)
  - Adds “**reproductive health decisionmaking**” to FEHA definitions
  - Includes, but is not limited to, a decision to use or access a particular **drug, device, product, or medical service** for reproductive health



# Reproductive Health

- Related issues:
  - Amendment to Constitutional Privacy Issues: potential conflict with new employer mandated reporter obligations
  - Coupled with requirements on insurers and health plans regarding benefits and notices



# Emergency Conditions

# Emergency Conditions

- (SB 1044) (Labor Code § 1139 *et seq.*): **FIRST REQUIREMENT** provides rights to workers **during “emergency conditions”**
- Employers may not take **adverse action against employees** for
- **refusal to report or remain at work** because they feel **unsafe** during an emergency condition



# Emergency Conditions

- Emergency conditions include:
  - disaster or extreme peril due to natural forces or criminal act(s), or
  - an order to evacuate
    - the workplace
    - an employee's home, or
    - an employee's child's school



# Emergency Conditions

- Emergency conditions *do not include* a “health pandemic”
- Law does not apply once “imminent and ongoing risk of harm to the workplace, the worksite, the worker, or the worker’s home have ceased”



# Emergency Conditions

- Reasonable belief that the workplace or worksite is unsafe means:
  - a reasonable person,
  - under the circumstances known to the employee at the time,
  - would conclude there is a real danger of death or serious injury if that person enters or remains on the premises



# Emergency Conditions

- Relevant factors include:
  - employer's compliance with **health and safety regulation(s) specific to the emergency condition** if known to the employee at the time, or
  - the employee received **training on the health and safety regulations mandated by law** specific to the emergency condition(s)



# Emergency Conditions

- Refusal to report or to leave *not* permitted for:
- **first responders, disaster service workers**, people required by law to render aid or remain on the premises in case of an emergency, private fire prevention resources, insurance risk mitigation **personnel**
- **licensed residential** care facility workers, employee or contractor of a health care facility who provides **direct patient care**, provides services supporting patient care operations during an emergency, or is **required by law or policy to participate in emergency response or evacuation**
- emergency services contractors, transportation employees, employees whose primary duties include assisting members of the public to evacuate in case of an emergency
- Employees of military bases, defense industrial base, **nuclear reactors or nuclear materials or waste**
- Employees who aid utility, communications, energy, or roadside assistance while the employee is actively engaged in or is being called upon to **aid in emergency response**
- **depository institution** employees



# Emergency Conditions

- Employees must give **notice – if feasible** – prior to invoking their rights under the law
- When not feasible, notice must be given “**as soon as possible**”



# Emergency Conditions - Communications

- **SECOND REQUIREMENT:** Employers may not prevent employees from **accessing an employee's mobile device or other communications device** for seeking **emergency assistance, assessing the safety of the situation, or communicating with a person to verify their safety**
- Applies only during an “emergency condition” (as defined above for the workplace, home or school)



# Emergency Conditions - Communications

- Mobile device access rule does not apply to employees:
  - of **depository institutions**
  - of any **correctional facility**
  - actively operating **certain equipment**



# COVID-19

# COVID Workers Compensation Presumption



# Workers Compensation

- (AB 1751) (Labor Code § 3212.86) Workers Compensation Presumption
  - Extends the current COVID “**rebuttable presumption**”
  - Workers who are **diagnosed or test positive** for COVID with **14 days after working** are *presumed* to have contracted it at work
  - The presumption (finally) sunsets on January 1, 2024

# COVID Cal-OSHA Authority



# Cal-OSHA Authority

- (AB 152) (Labor Code § 6325): **Broad DOSH Authority**
  - Cal-OSHA may prohibit **entry to a workplace or certain operations** if it believes that a workplace or particular operations expose workers to an **imminent risk of COVID**
  - **Notice to the employer** and posted notice required
  - Decision must be made in a manner that does not **materially interrupt critical governmental functions**
  - In effect only until **January 1, 2024**

# COVID NOTICE REQUIREMENTS



# COVID Notice

- (AB 2693) (Labor Code § 6409.6):
  - *Removes* prior individual notice requirements
  - Requires **prominent** display of **exposure notification** in places where postings are customarily displayed
  - Post within **one business day of notice** to employer and remain in place for **fifteen calendar days**



# COVID Notice

- Posted notice must contain:
  - **Dates** on which an employee, or employee of a subcontracted employer, was on the worksite premises
  - **Location of the exposures**, including the department, floor, building, or other area, but need not be so specific to allow **individual workers** to be identified.
  - Contact information for employees to receive **information regarding COVID-19-related benefits** to which the employee may be entitled under applicable federal, state, or local laws
  - Contact information for employees to receive the **cleaning and disinfection plan that the employer is implementing** (though this is no longer required!)





# COVID Notice

- Posted notice must be in English and the language understood by the majority of employees
- Must also be placed on any web or electronic portal maintained by the employer for communications
- Record of posting must be maintained for three years



# COVID Notice

- Employers **may send out individual notices** as previously required by state law **rather than posting**
- Notice must be provided to any **union or other labor representative** containing the same information as required for Cal-OSHA Form 300 injury and illness logs



# COVID Notice - Definitions

- “Worksite” means the **building, store, facility, agricultural field, or other location** where a worker worked during the infectious period. Does not apply to:
  - buildings, floors, or other locations of the employer that an individual with a confirmed case of COVID-19 **did not enter**,
  - locations where the **worker worked by themselves** without exposure to other employees, or
  - to a worker’s **personal residence or alternative work location** chosen by the worker when working remotely



# COVID Notice - Definitions

- “Close contact” includes:
  - for indoor airspaces of **400,000 or fewer cubic feet**: sharing the same **indoor airspace** with a COVID-19 case for a **cumulative total of 15 minutes** or more over a 24-hour period during the COVID-19 case’s infectious period
  - for indoor airspaces of **greater than 400,000 cubic feet**: being **within six feet of a COVID-19 case for a cumulative total of 15 minutes** or more over a 24-hour period during the COVID-19 case’s infectious period



# COVID Notice - Definitions

- “Notice of potential exposure” means :
  - notification from an employee, emergency contact, public health official, or licensed medical provider that employee has a confirmed case of COVID-19 and was on the worksite premises within the infectious period
  - notification through the testing protocol of the employer
  - notification from a subcontracted employer





# COVID Notice

- Note: these notification requirements are not fully integrated with DOSH standards
- New DOSH requirements take effect in January, 2023 – discussed below



# Surveillance Privacy

# Surveillance Privacy

- (AB 984) (Vehicle Code § 4854):
  - Employers may not use **devices in vehicles to monitor employees** except during work hours, and only if strictly necessary for the performance of the employee's duties
  - “Monitor **includes locating, tracking, watching, listening to, or otherwise surveilling employees**
  - Employees may **remove or disable** monitoring during off-duty hours



# Surveillance Privacy

- Employers using monitoring equipment must provide notice including:
  - description of the specific activities that will be monitored
  - description of the worker data that will be collected
  - notification of whether the data gathered will be used to make or inform any employment-related decisions, including, but not limited to, disciplinary and termination decisions, and, if so, how, including any associated benchmarks
  - Names and purpose of vendors or third parties to which information collected through monitoring will be disclosed or transferred



# Surveillance Privacy

- Employers using monitoring equipment must provide notice including:
  - description of the organizational positions that are authorized to access the data
  - dates, times, and frequency that the monitoring will occur
  - where the data will be stored and the length of time it will be retained
  - notification of the employee's right to disable monitoring, including vehicle location technology, outside of work hours.



# Surveillance Privacy

- Requirements will be **enforced by the Labor Commissioner**
- GPS tracking records must be **provided to the Labor Commissioner** upon request
- Penalty: \$250 initial, \$1000 subsequent violation, **per employee, per violation, and per day** that monitoring without proper notice is conducted

# Consumer Privacy



# California Consumer Privacy Act

- CCPA (Civil Code § 1798.100 *et seq.*)
  - enacted to protect consumer privacy in California
  - language applies to employers, but its **application to employers was limited** through 2022
  - legislation limiting application was not passed in 2022; the full **CCPA now applies** to covered employers



# California Consumer Privacy Act

- Covered businesses:
  - Gross annual revenue **greater than \$25 million**
  - Buy-sell-share **personal information of 100,000 or more** California residents or households
  - Derive 50% or more of annual revenue from **selling or sharing California residents' personal information**



# California Consumer Privacy Act

- Covered businesses:
  - Businesses **controlling or controlled by** CPRA-covered businesses that share branding and personal information
  - **Partnerships and joint ventures** where 40% of the businesses are CPRA-covered
  - Businesses that **voluntarily agree** to comply with the CPRA by certification to the California Privacy Protection Agency (e.g., some out-of-state payroll card providers)



# California Consumer Privacy Act

- CCPA requires disclosure to applicants and employees of:
  - The **categories of personal information** to be collected
  - The **purposes** for which the categories of personal information are collected or used and whether that information is sold or shared
  - The **categories of “sensitive personal information” collected** (such as Social Security number, driver’s license number, financial account information, login credentials, health information, biometric data, racial or ethnic origin, religious or philosophical beliefs, union membership, and genetic data), the purposes for which they are collected or used, and whether such information is sold or shared
  - The **length of time** the employer intends to **retain each category** of the personal information, including sensitive personal information (or criteria used to determine the retention period)



# California Consumer Privacy Act

- CCPA requires a privacy policy addressing applicant and employee rights to:
  - **delete personal information**, with some exceptions
  - **correct inaccurate** personal information
  - **access** personal information
  - **identify** personal information sold or shared (and where)
  - **opt out** of sale or sharing of personal information
  - **limit use and disclosure** of sensitive personal information
  - protection from **retaliation**



# California Consumer Privacy Act

- Privacy policy must be **updated every 12 months** and note:
  - categories of personal information **collected during past 12 months**
  - categories of **sources** from which information is collected
  - **business or commercial purposes** for collection
  - **categories of third party disclosure**
  - categories of personal information **sold or shared** in the prior 12 months or statement that none has been sold or shared
  - categories of personal information **disclosed for business purposes** in the preceding 12 months or statement that none has been disclosed



# California Consumer Privacy Act

- Training required for:
  - all individuals responsible for handling inquiries about the business' privacy practices or CPRA compliance
  - training required on **applicant, employee and consumer rights**;
  - how individuals may **exercise the rights**; and
  - the employer's responsibilities in **responding to inquiries**



# California Consumer Privacy Act

- **Security** also required:
  - **Appropriate security** must be implemented to protect against inadvertent disclosure of CCPA-covered data
  - Measures should apply to **physical and electronic** collection and storage
  - Security extends to agreements with **other vendors and third parties** who acquire sensitive data



# California Consumer Privacy Act

- Obviously: CCPA compliance requires an **entire seminar**
- Employers should be **prepared** to:
  - **Check whether they are covered** as businesses or via agreement;
  - Prepare **appropriate disclosure and notices**;
  - **Audit** types of information collected, **prepare** appropriate policies, and **designate/train** compliance personnel



# California Consumer Privacy Act

- The CCPA is administered by the **California Privacy Protection Agency (CCPA)** (<https://cppa.ca.gov/>)
- **CPPA regulations** should clarify CCPA obligations
- Updated advice will be available from the agency at <https://cppa.ca.gov/faq.html>



# Specific Industries

# Specific Industries

- (AB 1788) (Civil Code § 52.65): Sex Trafficking
  - Allows **civil penalties** against lodging operators
  - Applies if a supervisor **knows or acts in reckless disregard for trafficking activity** and **fails to inform** law enforcement, the National Human Trafficking Hotline, or another appropriate victim service organization **within 24 hours**
  - **Also applies if an** employee, acting within the scope of employment, knowingly **benefits by participating in a venture** where the employee knows or acts in reckless disregard of activity **constituting sex trafficking within the hotel**



# Specific Industries

- (AB 2183) (Labor Code § 1156.35): Agricultural Labor Relations
- Permits **agricultural employees** to *summarily elect* a union if an employer (1) agrees to specified neutrality rules, known as a “labor peace compact,” via mail ballot, or (2) based **solely on authorization cards or petition signatures** from a majority of the farmworkers in the unit sought to be represented
- ALRB guidance is published at: <https://www.alrb.ca.gov/ab-2183-guidance/>



# Specific Industries

- **(AB 257) Fast Food Industry:** Creates Fast Food Sector Council that may adopt minimum standards for fast food operators in chains with 100 or more establishments nationally
- **(AB 1601) Call Centers:** Increases mini-WARN requirements for call center relocations



# Specific Industries

- (SB 1334) Public Healthcare Employees: Extends meal and rest period requirements to public healthcare workers
- (AB 1775) Public Event Venues: Requires event venue vendors to certify compliance with OSHA requirements
- (AB 1720, SB 1093) Home Health Care: Removes prior criminal conviction declaration requirements for certain individuals; eases request for criminal record clearance transfers

# AGENCIES



# DOSH – Cal-OSHA

# COVID Regulation

- DOSH has developed new non-emergency regulations that will take effect in January, 2023
- The regulations apply to employers not covered by the state Aerosol Transmissible Diseases (ATS) standards
- A new fact-sheet is available from Cal-OSHA at:  
<https://www.dir.ca.gov/dosh/coronavirus/Non-Emergency-regs-summary.pdf>



# COVID Regulation

- Employers must continue to:
  - **provide face coverings** and ensure they are worn by employees as required by the California Department of Public Health (CDPH)
  - **report information** about employee deaths, serious injuries, and serious occupational illnesses to Cal/OSHA
  - **make COVID-19 testing available** at no cost and during paid time to employees following a close contact
  - **exclude COVID-19 cases** from the workplace until no longer an infection risk
  - **implement policies** to prevent transmission after close contact
  - develop, implement, and maintain effective methods to prevent COVID-19 transmission by **improving ventilation**



# COVID Regulation

- Under the permanent rules:
  - **standalone COVID-19 Prevention Plan no longer required**; IIPP must address COVID-19 as a workplace hazard
  - employers must provide **effective COVID-19 hazard prevention training**
  - employers must **provide face coverings** when required by CDPH, **respirators** upon request
  - employers must **identify COVID-19 health hazards** and develop methods to prevent transmission in the workplace
  - employers must **investigate and respond to COVID-19 cases** and certain employees after close contact
  - employers must make **testing available at no** cost to employees, including to all employees in the exposed group during an outbreak or major outbreaks
  - **affected employees must be notified** of COVID-19 cases in the workplace



# COVID Regulation

- Under the permanent rules:
  - employers must **maintain records of COVID-19 cases** and immediately **report serious illnesses to Cal/OSHA** and to the local health department when required
  - employers must now **report major outbreaks to Cal/OSHA**
  - employers **ARE NOT REQUIRED** to pay employees while they are excluded from work
  - **excluded employees must receive information** regarding COVID-19 related benefits they may be entitled to under federal, state, or local laws; their employer's leave policies; or leave guaranteed by contract



# COVID Regulation

- NOTE: the permanent rules *are not quite final* (when this presentation prepared)
- DOSH will publish the regulation text and guidance:

[https://www.dir.ca.gov/dosh/coronavirus/Non\\_Emergency\\_Regulations/](https://www.dir.ca.gov/dosh/coronavirus/Non_Emergency_Regulations/)

<https://www.dir.ca.gov/dosh/coronavirus/>

- Also monitor CDPH standards:

<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/EmployeesAndWorkplaces.aspx>



# U.S. Department of Labor

# DOL – Independent Contractors

- United States Department of Labor proposal would eliminate recent regulations that eliminated Obama-era independent contractor limitations
- Proposed regulations would return to a traditional “economic realities” focus similar to tests used in the past
- Test would focus on issues such as control, risk of loss and investment, and the economic reality of the relationship



# DOL – Independent Contractors

- New rule proposal at:  
<https://www.govinfo.gov/content/pkg/FR-2022-10-13/pdf/2022-21454.pdf>
- The revised rule would not change California's current *Dynamex – ABC* standard, but it would be relevant for federal tax and EEO issues, as well as other agency's positions (especially the NLRB)

# Federal Trade Commission



# Non-Compete Agreements

- Fair Trade Commission suggests that non-compete language violates the Federal Trade Commission Act
- Proposed rule would prohibit non-compete agreements with employees, contractors, and volunteers - and require notice to employees that prior agreements are invalid
- May have little effect on California employers but would affect threatened enforcement and out-of-state issues
- *See* [https://www.ftc.gov/system/files/ftc\\_gov/pdf/noncompete\\_nprm\\_fact\\_sheet.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf)

# NLRB – Unions



# National Labor Relations Board

- The whiplash see-saw continues from one administration to another
- There are good arguments on either side for most of these policies, but the rapid changes make it difficult for employers to predict developments
- The current NLRB General Counsel and Board are reversing changes during the Trump administration and implementing broad new progressive standards



# National Labor Relations Board

- “Make whole” – reimbursement for all losses resulting from an employer’s unfair labor practices, such as increases in insurance or healthcare costs and unions’ legal expenses
- Allowing “micro-units” such as part of a single store department
- Eliminating employer presentations to workers during working time (“captive audience meetings”)



# National Labor Relations Board

- “Blocking charges” – allowing unions to file unfair labor charges to delay elections they believe they will not win
- Restrictions on employees’ right to decertify voluntary recognitions
- Diminished recognition of employers’ private property rights despite contrary Supreme Court authority



# National Labor Relations Board

- Most relevant: resumption of policies that affected non-union employers such as:
  - Attacking handbook policies that allegedly violate the National Labor Relations Act
  - Limitations on employee communications, severance agreements, confidentiality policies
- See G.C. memo at: <https://apps.nlr.gov/link/document.aspx/o9031d4583506eoc>



# COURT CASES

# Rounding

- *Camp v. Home Depot U.S.A., Inc.*, 84 Cal. App. 5th 638 (2022)
- Employee filed class action alleging that **rounding to the quarter-hour failed to pay employees for all hours worked**
- Court issued **confusing opinion** admitting that state law traditionally allowed neutral rounding
- Court **refused to enter summary judgment** for the employer where the employer could not prove that the plaintiff individually was not shorted any time



# Rounding

- *Camp v. Home Depot U.S.A., Inc.*, 84 Cal. App. 5th 638 (2022)
- **Court raised issues** based on recent *de minimus* authority, the lack of clarity about rounding law, and whether the state intended to adopt federal regulations permitting neutral rounding policies
- Suggested that, if an employer *could* capture exact times with current technology, **it ought to do so**
- In essence: the court ***rejected existing authority*** and **manufactured** reasons to reject it.



# Rounding

- *Camp v. Home Depot U.S.A., Inc.*, 84 Cal. App. 5th 638 (2022)
- This has been hailed as a case **threatening rounding practices**
- In truth: the case is dangerous, as it may be adopted by trial courts, but it is a **clear violation** of an appellate court's duty to adhere to existing precedent when possible
- Employers **must nonetheless consider their rounding policies** and whether, while this case remains on the books, they ought to avoid rounding



# Derivative Penalties

- *Betancourt v. OS Rest. Servs., LLC*, 83 Cal. App. 5th 132 (2022)
  - Employers have argued for years that meal and rest period penalties are not 'wages' that support wage statement and waiting-time penalties
  - Supreme Court rules they *are*, allowing additional penalties for failure to provide breaks and to pay penalties for the failure
  - Highlights necessity of compliant meal and rest period practices



# Arbitration Agreements

- *Chamber of Commerce of the U.S.A. v. Bonta*, (prior) 13 F.4th 766 (9th Cir. 2021)
  - Case initially held (using **tortured logic**) that state law limiting the effect of mandatory arbitration agreements did not contradict the **Federal Arbitration Act (FAA)**
  - 2022: The same judges withdrew the opinion for reconsideration
  - At the moment: mandatory employment arbitration agreements remain *valid* in California



# Arbitration Agreements

- *Chamber of Commerce of the U.S.A. v. Bonta*, (prior) 13 F.4th 766 (9th Cir. 2021)
  - Remember: currently, *mandatory* arbitration agreements do not apply to sexual harassment under the FAA
  - But they may apply under the California Arbitration Act (CAA) unless *Bonta* is reinstated



# Arbitration Agreements

- *Viking River Cruises Inc. v. Moriana*, 142 S. Ct. 1906 (2022)
- LANDMARK CASE: California Private Attorneys General Act (PAGA) partly preempted by the FAA
- Court rules that individuals who execute arbitration agreements cannot join PAGA claims to claims based on other employees' working conditions



# Arbitration Agreements

- *Viking River Cruises Inc. v. Moriana*, 142 S. Ct. 1906 (2022)
  - Individual PAGA claims **must be arbitrated** if covered by a valid arbitration agreement
  - Sets aside state Supreme Court opinion that PAGA claims may *never* be compelled into arbitration



# Arbitration Agreements

- At the moment: Arbitration agreements may be offered as a **voluntary agreement** or as a **mandatory condition of employment**
- Mandatory agreements may not cover some claims (but probably do under state or federal law)
- Eliminate individuals' ability to bring class claims



# Arbitration Agreements

- Arbitration agreements will also require **individual PAGA claims** to be arbitrated
- Question: whether individuals may still bring representative claims on behalf of **other employees**
- Question: whether agreement signed **after** litigation is filed apply – and whether they may be **challenged by other employees**



# Nondisclosure Agreements

- *Elation Sys., Inc. v. Fenn Bridge LLC*, 71 Cal. App. 5th 958 (2021)
  - Employer sued for **breach of nondisclosure and settlement agreements** after former employee formed a new business entity
  - Jury found that the former employee violated the nondisclosure and settlement agreements by using the employer's confidential information
  - Trial court overruled the jury, but the appellate court reversed the trial judge and affirmed the jury verdict in favor of the employer



# Nondisclosure Agreements

- *Elation Sys., Inc. v. Fenn Bridge LLC*, 71 Cal. App. 5th 958 (2021)
  - MAIN POINT: California employers have long used strong confidentiality language because they cannot use noncompete agreements
  - This strategy is likely to become even more important if (as noted above) the FTC limits noncompetes nationwide



# Equal Pay Act

- *Allen v. Staples, Inc.*, 84 Cal. App. 5th 188 (2022)
  - Female employee was **one of the two highest-paid employees** in her position
  - Several **male employees were paid less** than her
  - But **one male employee** in the same position was **paid a higher rate**
  - Court holds that – even though most males made less than her – the **employee could bring an Equal Pay Act claims based on the single male employee** paid more than her



# Equal Pay Act

- *Allen v. Staples, Inc.*, 84 Cal. App. 5th 188 (2022)
  - This case presents many practical issues – all the male employees below her could bring suit as well?
  - Employers should carefully consider the amounts paid employees in similar positions, even in different locations
  - (Note the pay transparency and disclosures, above)

# ON THE HORIZON



# On the Horizon

- AB 2188 – Cannabis Use:
  - Protects off-the-job cannabis use under the Fair Employment and Housing Act (like sex and age discrimination)
  - Takes effect in 2024 – but likely to be set aside under existing California law





# On the Horizon

- There are many more changes likely.
- Various laws are also likely to be addressed such as potential state laws affecting arbitration agreements, family and child care.
- NLRB likely to move pro-employer, state PERB likely to move pro-union/employee.



# Be Prepared

- WATCH for interpretations by agencies over the coming months (DFEH, Labor Commissioner, etc.)
- READ postings and newsletters from chambers and industry organizations
- REVIEW policies and materials to ensure compliance with these new laws

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# QUESTIONS?



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THANK YOU!

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